Comment on Recent Cases

ACT TO REGULATE CARRIERS: DISCRIMINATIONS AND PREFERENCES: CONNECTING CARRIERS.—Probably the most stubborn problem arising in connection with the regulation of carriers is the requirement of through routing arrangements and the interchange of traffic between connecting carriers. The United States District Court has rendered a decision in the case of *Pennsylvania Company v. United States (Interstate Commerce Commission et al., Interveners)*,[1] which is likely to accomplish the final settlement of the question. Complaint was preferred to the Interstate Commerce Commission by the Buffalo, Rochester and Pittsburgh Railway Company with a view to forcing the Pennsylvania Company which had entered into agreements for through routing and interchange of freight with three other roads, to make a similar arrangement with the Buffalo, Rochester and Pittsburgh. The Interstate Commerce Commission ordered the formation of such an agreement, and the Pennsylvania Company filed this bill to restrain the enforcement of the order. The District Court sustained the order, although there was a strong dissent by Circuit Judge Buffington.

The question presented in the case is a most complex one. At common law a carrier was not bound to enter into agreements for through routes or the interchange of traffic with connecting carriers, but if it chose to do so it might make such an agreement with one carrier to the exclusion of all others,[2] or it might extend certain facilities to one carrier while offering totally different ones to another. Paragraph two of section three of the Interstate Commerce Act as originally enacted provided that every common carrier subject to the act, should afford all reasonable, proper and equal facilities for the interchange of passengers and property between its lines and lines connecting therewith, and that it should not discriminate in its rates and charges between such connecting lines: but this obligation was qualified by the proviso that it should "not be construed as requiring any such common carrier to give the use of its tracks or terminal facili-

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[1] (May Term, 1914), 214 Fed. 445.

[2] Atchison, Topeka & Santa Fe R. R. Co. v. Denver & New Orleans R. R. Co. (1884), 110 U. S 667, 28 L. Ed. 291, 4 Sup. Ct. Rep. 185.

ties to another carrier engaged in like business." In construing this section of the act the courts originally held, with a few exceptions, that a railroad company is not required to allow the same facilities for through traffic to all connecting lines, several federal cases holding that the act did not require a carrier entering into a through routing agreement with one connecting line to establish similar arrangements with another.[3] The commission, likewise, in a succession of cases decided that it had no power under the provisions of the act as construed by the courts, to compel carriers to enter into such agreements.[4] All of these decisions were rendered prior to the enactment of the Hepburn Amendment of 1906. That amendment gave the commission power, when necessary to give effect to any provision of the act, to establish through routes and maximum joint rates, provided no reasonable or satisfactory route had already been established. Adopting the reasoning of the cases decided prior to 1906 it would seem that this amendment introduced, or at least made effective, the requirement that a railroad company must extend the same facilities for through traffic to all connecting lines. It is difficult to reconcile these later cases, however, and it is too early to state conclusively just what obligation is imposed by the law as it now stands.

In its last analysis the solution of the problem depends entirely upon the construction of section three. If the section allows carriers to discriminate between connecting lines, the amendment has added nothing. But if it does forbid such discrimination, and has not been enforced merely because the commission has not had the power to establish through routes and joint rates, then the amendment adds vitality to the law. It is difficult to understand the purpose of the framers of the act, in inserting paragraph two of section three, unless it was to compel a carrier to treat all connecting lines equally in respect to through traffic agreements. To construe the act otherwise renders it absolutely of no effect, and it seems absurd to so construe affirmative legislation as to nullify its fundamental purpose.

The contention that the establishment of an involuntary traffic interchange amounts to a taking of tracks and terminal facilities, seems unsound. Under through routing agreements, connecting carriers do not acquire the use of another's tracks or terminals, as there is no invasion of the terminals by the locomotives of the

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[3] Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co. (1894), 63 Fed. 775; Little Rock & M. R. Co. v. St. Louis I. M. & S. Ry. Co. (1894), 59 Fed. 400; Kentucky and Indiana Bridge Co. v. Louisville and N. R. R. Co. (1888), 2 I. C. C. 162.

[4] R. R. Com. of Ky. v. The Louisville & N. R. R. Co. (1904), 10 I. C. C. 173; Fred G. Clark Co. v. Lake Shore & M. S. Ry. Co. et al. (1906), 11 I. C. C. 558; The Diamond Mills v. Boston & Maine R. R. Co. (1902), 9 I. C. C. 311.

connecting company. In a recent case[5] the commission says that it can not assent to the argument that when a railroad is required to transport cars to and from another's terminals, it is giving that company the use of its tracks and terminals within the meaning of section three. It adds "The contention made by the defendant, if admitted, would completely nullify the power given the commission to establish through rates". While this decision is doubtless not in harmony with the weight of judicial authority as it now stands, it certainly seems to be a step in the right direction, and the principal case following so closely on its heels gives rise to the hope that the courts and the commission will eventually construe section three so as to give it a meaning instead of completely nullifying it.

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ADMIRALTY: AEROPLANE NOT A SUBJECT OF ADMIRALTY JURISDICTION.—The case of *The Crawford Bros. No. 2*[1] has the distinction of being the first attempt in this country to enforce in a court of admiralty a libel *in rem* against an aeroplane. The libeled air craft had fallen into the waters of Commencement Bay, and after its rescue, the libelant was employed to repair it, for which service he claimed a maritime lien.

It is difficult to perceive the theory upon which the libelant founded his claim for a maritime lien, unless it be the fact that, there being no general jurisdiction capable of dealing with all questions arising out of aerial navigation, courts of admiralty should take upon themselves the burden of solving all of these problems as they arise. The libelant insisted that the proposed code of aerial navigation, as adopted by the International Juridic Committee on Aviation,[2] shows a striking similarity to the laws governing navigation upon the seas, and that the two jurisdictions could well be exercised by one court.[3] But this theory overlooks the fundamental fact that courts of admiralty in this country are, by the federal constitution, only given jurisdiction over admiralty and maritime causes, and that for a case to be cognizable in admiralty, it must arise out of transportation and navigation upon waters within the court's jurisdiction.

The air craft in this case was exclusively non-aquatic, and totally incapable of navigation upon water. But one section of the proposed code of aviation contemplates the navigation by air craft, of the waters within the bodies of states, and should such

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[5] St. Louis, S. and P. R. R. Co. et al. v. Peoria & Pekin Union Ry. Co. (1913), 26 I. C. C. 226.

[1] (June 27, 1914), 215 Fed. 269.

[2] (April 14, 1914), 18 Law Notes 5-7, 2 Docket 1161-1166.

[3] The possibility of adaptation of admiralty laws to aerial navigation is pointed out by Prof. Chessex in an article in 36 Clunet's Journal (1909), 681, 687, in which he suggests the allowance of a maritime lien for services in the nature of salvage, rendered to an aeroplane.